No. 90-5538

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1990

ZAKHAR MELKONYAN,
*Petitioner,*
v.
LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY BRIEF FOR PETITIONER

BRIAN WOLFMAN
(Counsel of Record)
ALAN B. MORRISON
PATTI A. GOLDMAN
THERESA A. AMATO
PUBLIC CITIZEN LITIGATION GROUP
Suite 700, 2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

JOHN OHANIAN
Suite 765, 6381 Hollywood Blvd.
Los Angeles, CA 90028
(213) 462-5540

*Counsel for Petitioner*

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES — Page





## TABLE OF AUTHORITIES—Continued

Page



*STATUTES, REGULATIONS, AND RULES*

a. *Statutes*

TABLE OF AUTHORITIES—Continued



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-5538

ZAKHAR MELKONYAN,
*Petitioner,*
v.
LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY BRIEF FOR PETITIONER

## ARGUMENT

### I. THE LANGUAGE, HISTORY, AND PURPOSES OF THE EQUAL ACCESS TO JUSTICE ACT MANDATE THAT THE THIRTY-DAY PERIOD FOR FILING A FEE PETITION COMMENCES ONLY AFTER THE ENTRY OF A COURT JUDGMENT.

#### A. A Judgment Is Not a Prerequisite to an Award of Fees.

The central theme of the Secretary's brief is that petitioner would require the Secretary to make a "pointless" post-remand district court filing in every case (Sec'y Br. 13, 14-16, 29 & n.24). The Secretary badly misreads both petitioner's brief and the language of the EAJA.

Petitioner has never argued that the Secretary must file the administrative record or the decision on remand in every case, or that the court is required to enter a

final judgment before considering an EAJA application. All that petitioner contends, and all that the EAJA plainly requires, is that, *in order for the 30-day statute of limitations to commence*, there must exist a final judgment of the district court. In sentence-six cases, since 42 U.S.C. § 405(g) contemplates a final order after the Secretary complies with his post-remand duties, and the court exercises review under sentence seven, there will be a final judgment for statute of limitations purposes. In other cases, if the Secretary wishes to place the claimant under a time constraint, he may simply present a form order of dismissal to the court, to which the claimant would surely consent. As far as the EAJA is concerned, nothing else is required of any party, including the court.[1]

Ordinarily, of course, the attorney, "being hungry to see some cash," will have incentive enough to file for fees as soon as possible. *McDonald v. Schweiker*, 726 F.2d 311, 314 (7th Cir. 1983). In any event, it will be a rare case where the government suffers any hardship when there is delay; to the contrary, it will have the money that ultimately may be payable to a claimant. If a dismissal is deemed important in a particular case, however, "[t]he government can start the time running by moving for such an order." *Tripodi v. Heckler*, 100 F.R.D. 736, 739 (E.D.N.Y. 1984).

---

[1] Even if a district court order were required prior to an EAJA fee award, the additional burden would be minimal. *Compare* Sec'y Br. 16. In all cases remanded under sentence six, the Secretary must return to the district court for a post-remand merits review. Furthermore, in Title II cases, where there is always a fee available under 42 U.S.C. § 406(b), a district court judgment is required under the plain terms of that statute. Thus, the only cases in which the issuance of a district court dismissal order might be independently necessary for EAJA purposes, would be in the relatively few pure SSI claims in which the case had been remanded solely under sentence four. *See* Social Security Administration, *Annual Report to the Congress* 29 (April 1990) (in fiscal year 1989, only 16.5% of disability cases filed in federal court were pure SSI claims).



The absence of a requirement of a judgment is strongly supported by the statutory language under which a prevailing party "shall, within thirty days of final judgment in the action," file a fee petition under the EAJA. 28 U.S.C. § 2412(d)(1)(B). It says nothing about a judgment being a prerequisite for fees. *See McDonald*, 726 F.2d at 314 ("the 30-day provision in the Act was meant to establish a deadline, not a starting point") (Posner, J.).

The 1985 legislative history also supports petitioner because it indicates that Congress was concerned about applications being improperly denied as premature. In *Auke Bay Concerned Citizen's Advisory Council v. Marsh*, 755 F.2d 717 (9th Cir. 1985), the prevailing plaintiff had filed a fee application shortly after being awarded a permanent injunction representing full relief on the merits, but before entry of a final judgment, which occurred almost a year later. The court originally held that this filing was premature, believing that there must be a final judgment before a fee application could be entertained, and denied fees altogether because no application was filed after entry of judgment. The House Report reacted to this decision as follows:

> Fee petitions may be filed before "final judgment". . . . The overly technical approach in *Auke Bay* . . . should be avoided.

H.R. Rep. No. 120, Pt. II, 99th Cong., 1st Sess. 6 n.26 (1985), *reprinted in* 1985 U.S. Code Cong. & Admin. News 151, 156 n.26. After the 1985 EAJA amendments, the *Auke Bay* opinion was withdrawn and revised. *Auke Bay Concerned Citizen's Council v. Marsh*, 779 F.2d 1391 (9th Cir. 1986). In doing so, the court recognized that the EAJA merely "establishes a clear date *after which* applications for attorney fees must be rejected as untimely." *Id.* at 1393. The court then held that a fee application is timely where the applicant has prevailed and the application is filed "no more than 30 days after final judgment." *Id.*; *accord Myers v. Sullivan*, 916 F.2d 659, 679 & n.20 (11th Cir. 1990).

Thus, the Secretary's concern that he will have to file the record and secure merits review in every remand case, simply to permit the filing of EAJA petitions, is wholly illusory. Although he assured this Court in *Finkelstein* that he would file all remand decisions with the court to obtain a judgment for EAJA purposes, Secretary's Brief at 44 n.35, *Sullivan v. Finkelstein*, 110 S.Ct. 2658 (No. 89-504), an order of dismissal is not required.[2]

### B. The Secretary Ignores the Plain Language of the Statute.

As this Court has said on countless occasions, in any case of statutory construction, the " 'starting point is the language of the statute.' " *Dole v. United Steelworkers of America*, 110 S.Ct. 929, 934 (1990) (*quoting Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 5 (1985)); *see also U.S. v. James*, 478 U.S. 597, 604 (1986); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975). Yet, the Secretary first explains why practical considerations counsel in favor of an affirmance, and only then does he address the words chosen by Congress (Sec'y Br. 18-19). While we believe that practical considerations support reversal (*see infra* Part F), such considerations must, of course, comport with the statutory language.

The Secretary offers no evidence that Congress meant to include decisions of administrative agencies when it decided that EAJA applications should be filed "within thirty days of final *judgment* in the action." 28 U.S.C. § 2412(d)(1)(B). In the face of definitions from numerous lay dictionaries and *Black's Law Dictionary* defining "judgment" solely in terms of a court order (Pet. Br. 12-13 & n.2), the Secretary continues to rely on the definition of "judgment" of "[a] leading American dictionary" (Sec'y Br. 18-19; *see* Opp. 8), which is apparently the only source available that, even secondarily, indicates that a "judgment" may be issued by some "other tribunal." The fact that one aberrant source might be supportive of the Secretary's position hardly overrides the "assum[ption] 'that the legislative purpose is expressed by the ordinary meaning of the words used.' " *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (*quoting Richards v. U.S.*, 369 U.S. 1, 9 (1962)).[3]

Moreover, the Secretary does not even address the statutory framework, which strongly buttresses the conclusion that Congress gave the term "judgment" its ordinary legal meaning. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). As we have said (Pet. Br. 14-15), the EAJA uses the term "judgment" on several occasions, and each time the reference is clearly to the action of a federal court. Even if the term were ambiguous in § 2412(d)(1)(B)—which it is not—other uses of that term in the same statute make certain that Congress intended the 30-day filing period to be triggered by the final judgment of a court. *See* 2A *Sutherland Statutory Construction* § 47.16, p. 161 (Sands 4th ed. 1984); *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 157 (1983) (plain meaning of statute controls unless contrary meaning arises elsewhere in regulatory or statutory context).

In addition, we cannot assume that Congres was acting without any purpose when it decided that the EAJA filing deadline for administrative cases under 5 U.S.C. § 504(a)(2) should be 30 days from a "final disposition in the adversary adjudication," but that it should be 30 days from "final *judgment*" in court cases under § 2412

---

[2] Even if the EAJA were construed to require a court judgment, the court could enter one which it considers the fee application. *See, e.g., Bradley v. Sec'y of HHS*, 741 F.Supp. 1461, 1464 (D. Idaho 1990); H.R. Rep. No. 99-120, Pt. I, 99th Cong., 1st Sess. 20, *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 148 (court need not wait for Secretary to make post-remand filing).

[3] *Black's Law Dictionary* does include an annotation to a 1932 case that refers to a "judgment" as the decision of a court or "other competent tribunal" (Sec'y Br. 19, *quoting Black's Law Dictionary* 842 (6th ed. 1990), but *Black's* definition is framed solely in terms of "an authentic decision of a court of justice . . . ." *Id.* at 841.

(d)(1)(B) (emphasis added). The Secretary's oblique reference (Sec'y Br. 30-31) to *Sullivan v. Hudson*, 490 U.S. 877 (1989), to counter this clear delineation between "judgments" and administrative adjudications, is misguided. *Hudson* held that administrative proceedings on remand in Social Security matters are compensable under § 2412(d), rejecting the Secretary's argument that, because § 504 provides a route for recovery in certain administrative proceedings, it is the only such route. In doing so, the Court adopted the view that "Congress carved the world of EAJA proceedings into 'adversary adjudications' and 'civil actions,'" *Hudson*, 490 U.S. at 892, thus bolstering our argument that Congress' use of the term "judgment" to describe the final word of a court, and "disposition" to do the same in the administrative context was not accidental.

Finally, the Secretary's suggestion that the term "judgment" *could* be used to characterize the decision of an administrative agency is ultimately irrelevant because that term is not employed to describe decisions of administrative agencies in the American legal system. *See* 5 U.S.C. § 551(6), (7) (indicating that all adjudications governed by Administrative Procedure Act culminate in an "order," defined as "the whole or a part of a final disposition . . ."). Not surprisingly, the Secretary has not pointed to a single administrative agency that issues "judgments" of any kind, and, to our knowledge, there are none. Moreover, the Secretary does not refer to any of his administrative decisions as "judgments." *See, e.g.*, 20 C.F.R. §§ 416.1402 ("inital determinations"), 416.1453 ("decisions"), 416.1481 ("decision" or "denial of review"); *see also Warner v. Bowen*, 648 F. Supp. 1409, 1411 (S.D. Fla. 1986); *Alexander v. Heckler*, 612 F. Supp. 272, 274 (D.R.I. 1985) ("a decision of the Social Security Administration is simply not a judgment within the common definition of the term, and as such, cannot logically be construed as a 'final judgment' necessary to trigger the E.A.J.A. filing limitation"). Furthermore, the "decisions" of the Secretary simply do not possess



the essential characteristics of judgments, *i.e.*, they are not enforceable through execution or otherwise, *see* Fed. R. Civ. P. 58, 62(a), nor may they be appealed by both parties, because only the claimant can seek review of the Secretary's administrative decisions. *See* 42 U.S.C. § 405(g) (sentence one). It is thus inconceivable that Congress believed that the Secretary's administrative decisions would constitute "final judgments" under § 2412(d)(1)(B).

**C. The Legislative History Fully Supports Petitioner.**

The Secretary argues that the 1985 amendment defining "final judgment" as a "judgment that is final and not appealable," 28 U.S.C. § 2412(d)(2)(G), somehow supports a determination that such judgments include administrative decisions. As we have explained (Pet. Br. 21-23), and as the Secretary agrees (Sec'y Br. 20-21), the sole purpose of this amendment was to adopt the position, first espoused by Judge Posner in *McDonald*, 726 F.2d at 313, and urged at Congressional hearings, that a *district court judgment* becomes "final" when it no longer may be appealed, rather than when it is docketed. *See generally Myers*, 916 F.2d 659. This particular statutory revision did not address, let alone change, the accepted definition of "judgment."

The Secretary wholly ignores numerous references in the legislative history to court orders, and *only* court orders, as the events that trigger the EAJA's 30-day statute of limitations (*see* Pet. Br. 22-23). And, most importantly, he is unable to circumvent legislative history expressly stating that, in social security cases, "the agency decision after remand" "is not a 'final judgment'" for EAJA purposes. H.R. Rep. No. 120, Pt. I, *supra* at 19.

Recognizing the importance of this legislative history, the Secretary makes three interrelated, but unavailing attempts to downplay it (Sec'y Br. 33-34). First, he argues that because this critical passage cites *Guthrie v. Schweiker*, 718 F.2d 104 (4th Cir. 1983), it should be dis-

regarded. As we acknowledged (Pet. Br. 17 n.3), *Guthrie*'s holding that all remand orders are interlocutory and that, therefore, all remands under 42 U.S.C. § 405(g) must return to the district court for further merits review, is only partially viable today in light of *Sullivan v. Finkelstein*, 110 S.Ct. 2658 (1990), which held that cases remanded under sentence four of § 405(g) are final appealable orders under 28 U.S.C. § 1291. This did not upset the *Guthrie* analysis with respect to remands under sentence six of § 405(g), nor did it undermine its central proposition that a court judgment is necessary to trigger the EAJA limitations period, as this Court itself noted. *Finkelstein*, 110 S.Ct. at 2665 n.8.

More fundamentally, regardless of the degree to which *Guthrie* is still viable, this case involves what Congress contemplated in 1985 in revising the EAJA's statute of limitations, not the Secretary's responsibilities under § 405(g), or whether a particular type of order is appealable under § 1291. Therefore, Congress' citation to *Guthrie* is important because *Guthrie*, and hence Congress, expressly adopted the position that administrative decisions cannot constitute final judgments under the EAJA, with a full understanding of the consequences of its actions. A subsequent decision of this Court on the scope of § 1291 obviously did not inform the Congress and, thus, is irrelevant to this case.

This analysis also undercuts the Secretary's objection that petitioner's legislative history has already been rejected in *Finkelstein* (Sec'y Br. 34). Admittedly, *Finkelstein* disregarded this legislative history as evidence of when a district court decision is "final" for § 1291 purposes, because on that question it was "subsequent legislative history," only tangentially related to § 405(g), and thus it could not have shed light on what Congress meant when it enacted § 405(g). *Finkelstein*, 110 S.Ct. at 2665 n.8. But with respect to the EAJA, this was "plain old legislative history," issued contemporaneously with passage of the law, *see id.* at 2667 (Scalia, J., concurring), and it therefore directly con-



firms that Congress required a court judgment to trigger the limitations period. *Id.* at 2665 n.8 ("this part of this particular committee report concerned the proper time period for filing a petition for attorney's fees under EAJA, not appealability").

Finally, the Secretary complains that the significance of this legislative history is diminished because it is contained in the part of the committee report addressing the interaction of the EAJA with the attorney's fee provision of 42 U.S.C. § 406(b). If anything, this placement is supportive of our position because, as we have noted (Pet. Br. 35), the timing of joint EAJA/§ 406(b) petitions is extremely problematic under the Secretary's theory of this case, since § 406(b) plainly requires a district court judgment. Thus, the committee properly addressed timing issues in the context of its discussion of the EAJA/§ 406(b) set off, adopting the very position urged here by petitioner.

### D. *Hudson* and *Finkelstein* Lend No Support to Respondent.

In *Sullivan v. Hudson*, 490 U.S. 877 (1989), this Court ruled that administrative proceedings held by the Secretary after remand were so closely related to the proceedings in the district court that work performed on such remands was compensable under the EAJA. In doing so, the Court reasoned that the district court "retain[ed] jurisdiction over the action within the meaning of the EAJA." *Id.* at 887 (quoting the 30-day EAJA filing period and approving *Guthrie*). The Secretary argues that, because remand proceedings are part of the EAJA's "civil action" under *Hudson*, administrative decisions on remand may constitute "final judgments" under the EAJA. But simply because administrative proceedings may be a part of a civil action for fee purposes, says nothing about whether their resolution constitutes a judgment under the EAJA. *See Hudson*, 490 U.S. at 887 (EAJA's civil action ends with court judgment).

Next, the Secretary contends that *Hudson*, when read in conjunction with *Finkelstein*, requires affirmance here because, in cases remanded under sentence four of § 405(g), the district court order is "final' and, thus, by default, only the administrative decision on remand, can create finality for EAJA purposes. The fatal flaw in this argument is that it fails to look to the language of the EAJA and its legislative history, *i.e.*, it ignores Congressional intent on the precise point now before this Court, relying instead on a precedent concerning appealability of a narrow class of district court orders. Moreover, *Finkelstein* declined to limit *Hudson* in the way that the Secretary suggests here, noting that, although a sentence-four case may be over for appellate purposes after remand, it is not over for EAJA purposes. 110 S.Ct. at 2666; *see also id.* at 2665 n.8 (suggesting continuing vitality of 1985 legislative history and *Guthrie* for EAJA purposes).[4]

This discussion underscores the impossibility of applying *Finkelstein* to EAJA timeliness questions. *Finkelstein* held that a district court *judgment* issued under sentence four of § 405(g), not an agency decision, is a final, appealable order under § 1291. If *Finkelstein* is to "apply" here, therefore, the 30-day deadline would begin to run after entry of the final sentence-four remand order. This would, of course, totally eviscerate the EAJA in remand cases since the fee applicant is not yet a prevailing party at that point. *See Hudson*, 490 U.S. at 886; *see also Hanrahan v. Hampton*, 446 U.S. 754 (1980). Moreover, work performed in the administrative proceeding on remand would not be compensable for the simple reason that it has not yet taken place, thus undermining the very holding in *Hudson*.

---

[4] Indeed, case law both before and after *Finkelstein* is critical of the decision below for its infidelity to *Hudson*. *See, e.g., Myers*, 916 F.2d at 679 n.20; *Smith v. Sullivan*, No. LR-C-89-138, 1991 U.S.Dist. LEXIS 1529 (E.D. Ark. Feb. 6, 1991); *Lewis v. Sullivan*, 752 F.Supp. 208, 210 (E.D. La. 1990); *Bradley*, 741 F.Supp. at 1464; *see also Seymore v. Sec'y of HHS*, 738 F. Supp. 235, 237 (N.D. Ohio 1990).



It is thus clear that *Finkelstein* cannot logically be applied to the EAJA without destroying the fee-shifting scheme contemplated by Congress and given full meaning by *Hudson*. 490 U.S. at 890 ("we find it difficult to ascribe to Congress an intent to throw the Social Security claimant a lifeline that it knew was a foot short"). *Finkelstein* simply does not relate to the EAJA, as the Court itself noted. 110 S.Ct. at 2666-67.

### E. Even if the Secretary's Administrative Decision Might Constitute a "Final Judgment" in Some Cases, It Could Not Possibly Do So in This Case.

The Secretary's argument is built on the ruling in *Finkelstein* that district court remands under the fourth sentence of § 405(g), are final orders for appealability purposes under § 1291. Under sentence *four*, the court may remand the case for further administrative proceedings because of errors of law. *Finkelstein*, 110 S.Ct. at 2663-64. Under sentence *six*, however, the district court may remand the case for the taking of new evidence which is material to the claimant's application for benefits. *Id.* at 2664 (sentence six used when "district court learns of new evidence not in existence or available to the claimant at the time of the administrative proceeding"). As we discussed in our opening brief (Pet. Br. 31), the remand here was clearly based on sentence six. As the Secretary has conceded, new evidence suggesting that petitioner was disabled "was the basis for the Secretary's December 1984 request that the District Court remand the action to the Secretary." *See* Brief for Secretary at 5 (9th Cir. filed June 16, 1987).

When a case is remanded under sentence six, the Secretary

> *shall*, after the case is remanded, and after hearing . . . additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and *shall* file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.

42 U.S.C. § 405(g) (emphasis added). Because the government did not comply with these responsibilities here, no post-remand order on the merits was entered.[5]

Although he does not, and cannot, claim that the remand was pursuant to sentence four, the Secretary states that the court exercised its "inherent authority" (Sec'y Br. 28 n.23), and issued an order "clearly contemplat[ing] that it was doing just what the district court did in *Finkelstein*" (Sec'y Br. 28). This is flatly incorrect because in *Finkelstein*, unlike here, the district court had made extensive findings and conclusions of law, one of which struck down a federal regulation. 110 S.Ct. at 2663. Nor would it matter if the district court here had believed that it was "terminating all judicial proceedings" (Sec'y Br. 28). In *Finkelstein*, the district court (and the Third Circuit) believed that the remand order was *not* a final order, 110 S.Ct. at 2662, but this Court disagreed; here, regardless of what the district court believed, the substance of its remand was under sentence six to consider new evidence.[6]

Perhaps realizing the difficulty of maintaining that this case was remanded under sentence four, the Secretary gratuitously suggests that "[t]here is much to commend the Ninth Circuit's approach even in a case remanded to the Secretary pursuant to the sixth sentence of Section 405(g)" (Sec'y Br. 29 n.24). We disagree.

[5] The U.S. Attorney was instructed to obtain an order of dismissal, but failed to do so (JA 17). Contrary to the Secretary's assertion (Sec'y Br. 18), the district court did enter a post-remand judgment in conjunction with its decision on fees (JA 22).

[6] Similarly, the Secretary's heavy reliance on the fact that the remand order was styled a "judgment" is of no import. As *Finkelstein* noted, it is the substance of the remand, not its name, that places the case in the sentence-six or sentence-four category. 110 S.Ct. at 2665 n.7. The Secretary also makes much of the fact that the district court's two-line remand order "did not cite the sixth sentence of Section 405(g)" (Sec'y Br. 28), but then on the very next page he recognizes that "many remand orders, like the one in this case are brief and are drafted without specific reference to particular provisions of Section 405(g)" (Sec'y Br. 29).



The mandatory submission of the record and post-remand review in sentence six cases is essential to the statutory framework because it represents the district court's first opportunity to review the administrative decision, as Congress directed it to do. *See Wilson v. Sullivan*, 751 F.Supp. 1281, 1285 (N.D. Ill. 1990); *see also Hudson*, 490 U.S. at 885-86. It is mere question-begging to suggest that the filing of the administrative record and transcript is superfluous "for situations in which [there is no] dispute regarding the claimant's eligibility" (JA 29 n.24), because these filings, which are otherwise within the Secretary's exclusive control, provide the *only* means, in a sentence-six case, to obtain further merits review of a decision that the *claimant* believes is not fully favorable. *Accord* A. Abraham & D. Kopelman, *Federal Social Security* 124 (American Law Institute 1979); Pet. Br., App. 2a, 4a (post-remand review, initiated by the Secretary, available in every case). Finally, a district court judgment, even if it is only a dismissal that, in effect, affirms a favorable administrative decision on remand, furnishes the *only* mechanism for enforcing the claimant's victory (*see supra* page 7).[7]

However, the simple answer to the Secretary's complaint that he should not have to make any post-remand filings is that it flies in the face of what Congress expressly mandated—that the Secretary return to district court after the completion of every sixth-sentence remand. If "there is little point" in this process (Sec'y Br. 29 n.24), it is for Congress, and not this Court, to rewrite the statute.

[7] Indeed, in sentence-four cases, where the government does not exercise its right to appeal, the district court obviously retains limited jurisdiction to enter a judgment upon a claimant-favorable administrative decision; otherwise the claimant would have no ability to enforce the decision which was obtained by virtue of § 405(g). As we have explained (Pet. Br. 34-38), jurisdiction to enter this type of judgment is explicit under 42 U.S.C. § 406(b).

**F. The Secretary's Approach Creates Great Complexity and, Therefore, Would Engender Considerable Litigation.**

Far from creating "a uniform, easily applied rule for all administrative and judicial orders" (Sec'y Br. 37), the Secretary's approach creates a series of rules that are difficult to discern in a particular case and which serve no purpose under the EAJA. First and foremost, even if the Secretary's reliance on *Finkelstein* is correct, the agency's decision on remand cannot trigger the EAJA filing deadline for cases remanded under sentence six, which are not final on the merits until the district court exercises the review contemplated by sentence seven. *See Buck v. Sec'y of HHS*, 923 F.2d 1200, 1205 (6th Cir. 1991) (*cited with approval in* Sec'y Br. 12). Thus, under the Secretary's theory, the district court will be forced "to distinguish between different kinds of remands [and] constru[e] sometimes ambiguous district court orders" (Sec'y Br. 29 n.24).[8]

Furthermore, it remains entirely unclear when an EAJA petition should be filed in cases involving hybrid fourth-sentence/sixth-sentence remands, as was true in three of the four cases considered in *Myers*. *See* 916 F.2d at 678 n.19. The solution for this morass is simple: not abrogation of sentence six of § 405(g), as the Secretary suggests (Sec'y Br. 29 n.24), but rather a ruling that, in all cases, the EAJA's statute of limitations commences only upon the entry of a court judgment.

In addition, the Secretary and the Ninth Circuit concede that the EAJA's limitations period should run from the district court judgment, even in remand cases, when

[8] *See Myers*, 916 F.2d at 677 n.18; *Wilson*, 751 F.Supp. at 1287 (where district court denied cross motions for summary judgment, and remanded for ALJ to more fully develop record, case was remanded under sentence six); *compare Finkelstein*, 110 S.Ct. at 2665 n.8 ("far from clear that *Guthrie* did not involve a sixth-sentence remand"), *with Wilson*, 751 F.Supp. at 1286 ("Both [*Guthrie* and *Brown*] clearly were discussing sixth sentence remands").



a post-remand court order is actually issued (Sec'y Br. 32 n.27; JA 31, *distinguishing Papazian v. Bowen*, 856 F.2d 1455 (9th Cir. 1988)). In making this concession, the Secretary distinguishes *Myers v. Sullivan*, 916 F.2d 659, from the present case, on the ground that there "the Secretary's decision on remand in fact was filed with the district court, and the district court then entered an order disposing of the case" (Sec'y Br. 32 n.27). This acknowledgment, which seems fair because it comports with § 405(g), at least in sentence six cases, only adds to the confusion. If the Appeals Council issues a decision which becomes "final," and thereafter the Secretary files that decision and the court enters a final order, does the administrative decision trigger the limitations period, or is the limitations period revived by the entry of the district court order?[9] If, instead, the district court order is entered within the 65 days that the Secretary now believes must pass before the administrative becomes final (Sec'y Br. 35-37), does it trump the administrative decision, or may the claimant still file for fees based on the later date of the agency ruling? The Secretary's apparent support for *Myers* and the Ninth Circuit's continued adherence to *Papazian* (JA 32), do not begin to answer these questions.

Thus, the Secretary's position promises more litigation, more uncertainty, and, most significantly, no increased fidelity to the will of Congress. Moreover, the primary purposes of the EAJA—to encourage ordinary citizens to challenge oppressive government conduct and to shape its future conduct, *Commissioner, INS v. Jean*, 110 S.Ct. 2316, 2322 & n.14 (1990)—would be seriously disserved by the spectrum of unpredictable rules urged by the Secretary. On the other hand, petitioner's position provides one rule for all remand cases, thereby eliminating

[9] In three of the four cases in *Myers*, the district court order was entered after the administrative decision on remand became final, with one order being entered more than two years after the Appeals Council decision, to which the Secretary made no objection. 916 F.2d at 661-64.

most, if not all, EAJA timing disputes and allowing the courts to devote their resources to better purposes.

## II. THE NINTH CIRCUIT'S RULING SHOULD NOT BE APPLIED IN THIS CASE.

Even if the Court finds that an Appeals Council decision can constitute a "judgment" under the EAJA, that ruling should apply prospectively only. *See Chevron Oil v. Huson*, 404 U.S. 97 (1971). The Secretary seeks to avoid application of *Chevron Oil* by arguing that the EAJA's 30-day filing period is jurisdictional, thus precluding a non-retroactive decision in this case. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379-80 (1981). However, *Irwin v. Veterans Administration*, 111 S.Ct. 453 (1990), ruled that, unless Congress expressly provides otherwise, filing periods for suits against the government are not jurisdictional. In response, the Secretary contends that, because the EAJA states that a party "shall" file an attorney's fee application within 30 days of final judgment, the 30-day limit is an absolute bar. But *Irwin* expressly held the opposite—a statute is not jurisdictional based on its use of assertedly mandatory language such as "shall," because such an approach "would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress." *Id.* at 457.[10]

[10] The Secretary's use of "legislative history" (Sec'y Br. 46), indicating that the 30-day period is jurisdictional, is misleading. The committee report cited, S.Rep. No. 856, 98th Cong., 2d Sess. 16 (1984), was prepared for a version of the EAJA that was vetoed by the President. *Cf. Finkelstein*, 110 S.Ct. at 2667 (Scalia, J., concurring). The inherent unreliability of such a report is underscored here because there is much more in-depth legislative history accompanying the bill that actually became law and that excludes the earlier language concerning the purportedly jurisdictional nature of the limitations period. *See* H.R. Rep. No. 120, Pt. I, *supra* at 19-20; H.R. Rep. No. 120, Pt. II, *supra* at 6 & n.26. Indeed, it would be anomalous for Congress to have made the filing deadline strictly jurisdictional, while at the same time urging that it not be construed in an "overly technical" manner as a "trap for the unwary." *Id.*



The Secretary also maintains that petitioner is not entitled to relief under *Chevron Oil* because he seeks shelter from the ruling in *this case*, not from the application of adverse precedent in another case (Sec'y Br. 43). The Secretary does not explain, however, why this purported distinction ought to make a difference. To the contrary, petitioner is no less deserving of protection from an abrupt, wholly unpredictable change in the law than are other claimants whose EAJA petitions are pending in the Ninth Circuit and who, the Secretary concedes (Sec'y Br. 44 & n.36), may well be able to argue for the non-retroactive application of the decision below. Moreover, the Secretary's improbable argument that *Finkelstein*, decided approximately five years after the Appeals Council's decision in petitioner's favor, requires reversal here, is indistinguishable from the prospective application of *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), granted in *Chevron Oil*. There is thus no question that the *Chevron Oil* test must be considered.

Turning to the first factor, the Secretary suggests that the decision below did not overrule clear precedent because only two decisions prior to the 1985 amendment—*Guthrie* and *Brown v. Sec'y of HHS*, 747 F.2d 878 (3d Cir. 1984)—"suggested a contrary rule" (Sec'y Br. 47), and that the amendment evinced an abrupt turnabout on this issue. This is incorrect on its own terms because there was other pre-reenactment authority consistent with *Guthrie* and *Brown*, and, perhaps more importantly, there was none suggesting otherwise.[11] In addition, the Secretary does not mention that, in June 1985, when petitioner failed to divine that the Appeals Council's decision was a "judgment" which might trigger the statute of limitations, the EAJA had not yet been reenacted.

[11] *See, e.g., Taylor v. Heckler*, 778 F.2d 674, 678 & n.4 (11th Cir. 1985) (decided on basis of pre-reenactment law, but noting that 1985 legislative history "supports our holding in this case"); *Alexander*, 612 F.Supp. at 272; *Baily v. Heckler*, 580 F.Supp. 33, 34 (W.D.N.C. 1984).

Thus, the nationwide practice requiring a district court judgment to commence the 30-day period, which the Secretary had promised to abide by in *Brown*, was the law at the only time relevant to the retroactivity inquiry. *See American Trucking Assn's v. Smith*, 110 S.Ct. 2323, 2336 (1990) (plurality opinion).

Moreover, even if post-1985 developments were relevant, it is pure fiction to suggest that the law changed prior to the decision below. As a threshold matter, the Secretary's position on retroactivity—that *petitioner* should have foreseen the Ninth Circuit's decision—is a little more than ironic, since *he* has now disavowed the Ninth Circuit's view as to when an EAJA application is timely (Sec'y Br. 35-37), although he fully supported that view in his opposition (Opp. 7-8). As we discussed in our opening brief (Pet. Br. 43 & n.10), prior to the decision below, *every* post-reenactment precedent, except for a 1988 district court decision based on a faulty reading of Eighth Circuit law, either implicitly or explicitly rejected any notion that the Secretary's administrative decisions could commence the 30-day statute of limitations.[12] Finally, the Secretary's contention that the Ninth Circuit ruling did not establish new law is especially hollow in light of the fact that the Secretary *still* informs every claimant that he will file the post-remand decision and administrative record with the court for further judicial action (Pet. Br., App. 2a, 4a).

Petitioner's opening brief fully demonstrates why retrotractive application would produce substantially inequitable results for both petitioner and others similarly situated (Pet. Br. 47-48). But we cannot let pass the Secretary's response, which goes far afield from the proper inquiry, and instead attacks the supposed failure to file a fee application until May 1986, about eight

[12] *See Hudson*, 490 U.S. at 886-87 (approving *Taylor*, *Brown*, and *Guthrie*); *see also, e.g., Papazian*, 856 F.2d 1455; *Celeste v. Sullivan*, 734 F.Supp. 1009, 1010 (S.D. Fla. 1990); *Derby v. Bowen*, 636 F.Supp. 803, 805 (E.D. Wash. 1986); *Aldrich v. Heckler*, 609 F.Supp. 863, 864 (D. Me. 1985).



months after petitioner was finally paid disability benefits (JA 24). This charge has nothing to do with the inequity prong of *Chevron Oil*, but rather begs the question under the first prong—whether the decision worked a change in the law. If the Secretary had wanted a final judgment for EAJA purposes, it was his responsibility to file the administrative decision after remand. Although the U.S. Attorney was instructed to do so in this case, he did not, and petitioner therefore moved for fees and informed the court of the outcome of the administrative proceedings. Indeed, the Secretary concedes that it was, and still is, his policy to make post-remand filings in all cases, admitting only that he "does not propose to continue the practice of making such post-remand filings as a general matter" if he prevails here (Sec'y Br. 31 n.26). Yet, incredibly, the Secretary faults petitioner for conduct fully consistent with his own policies.[13]

This sequence of events fully supports our claim that erecting a new time bar to EAJA fees is inequitable in this case, where petitioner's attorney had provided three years of representation to an indigent SSI claimant. Moreover, as we have shown (Pet. Br. 48), retroactive application of the theory now espoused by the Secretary would be extremely unfair to many EAJA applicants, not their attorneys, who may lose significant amounts of benefits under 42 U.S.C. § 406(b) and who, to this day, still are informed by the Secretary that he will make

[13] The Secretary attempts to excuse the U.S. Attorney's failure in this case to inform the district court of the administrative decision because the Secretary's form directed the U.S. Attorney to dismiss the case "if appropriate." If one reads the whole form, however, it is clear that the U.S. Attorney was supposed to report to the court in every case, although it may have been not "appropriate" to *dismiss* every case after remand, because the decision was only "partially favorable," or because the "supplemental transcript or the record" had not yet been prepared (J.A. 17). Indeed, even in cases where "the plaintiff [did] not wish to continue with the litigation," the U.S. Attorney was directed to "obtain an order of dismissal" (JA 18).

post-remand filings and obtain a judgment in every case (Pet. Br., App. 2a, 4a).

The best answer to the retroactivity question, however, is that it should not be reached because petitioner's EAJA application was timely filed. Although in most court-remanded cases, the desire for compensation provides adequate incentive for the prevailing party to seek an EAJA fee within a reasonable time, if the Secretary wants the 30-day filing period to commence, he is free to obtain a final district court judgment, as he is required to do in cases remanded under the sixth sentence of § 405(g). This simple procedure provides one readily discernible statute of limitations for every remanded case, in the social security area as well as in every other administrative context.

## CONCLUSION

For the reasons stated above and in petitioner's opening brief, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

BRIAN WOLFMAN
(Counsel of Record)
ALAN B. MORRISON
PATTI A. GOLDMAN
THERESA A. AMATO
PUBLIC CITIZEN LITIGATION GROUP
Suite 700, 2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

JOHN OHANIAN
Suite 765, 6381 Hollywood Blvd.
Los Angeles, CA 90028
(213) 462-5540

*Counsel for Petitioner*